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PROFESSIONAL RESPONSIBILITY

Clark D. Cunningham†

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I. INTRODUCTION

This issue marks the first annual *Survey* of Michigan law regarding legal ethics and the regulation of attorney conduct since 1982. Accordingly, a brief overview of the subject is appropriate before reviewing developments in the law during the *Survey* period.[1]

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1. The leading article on the subject continues to be Dubin & Schwartz, *Survey and Analysis of Michigan's Disciplinary System for Lawyers*, 61 U. DET. J. URB. L. 1 (1983). When the article was published Professor Lawrence Dubin was the Vice Chairperson of the Michigan Attorney Grievance Commission. Michael Alan Schwartz was and continues to be the Administrator of the Attorney Grievance Commission. *The Michigan Bar Journal* has also published several issues devoted to this area of Michigan law. *See*, *Attorney Malpractice*, 65 MICH. B.J. 276 (1985); *Ethics and Professional Responsibility*, 64 MICH. B.J. 276 (1985); *Lawyering*, 63 MICH. B.J. 235 (1984).

The Michigan Supreme Court interprets its constitutional mandate[2] to include the regulation of the practice of law in Michigan.[3] Therefore, the court serves as the major source of positive law on this subject through the promulgation of rules, administrative orders, decisions in contested cases, and decisions by agencies created by the court to exercise its delegated authority. Unlike many state bars, the State Bar of Michigan, an integrated bar association,[4] has had no authority in this area since 1970.[5] The Michigan Court of Appeals and lower courts in Michigan also have no role in attorney discipline.

During the *Survey* period, the primary source of substantive law for lawyer conduct was the *Michigan Code of Professional Responsibility* (Michigan Code), which the Michigan Supreme Court adopted in 1971.[6] On March 11, 1988, as the *Survey* issue was going to press, the Michigan Supreme Court repealed the Michigan Code and replaced it with the *Michigan Rules of Professional Conduct* (MRPC), effective October 1, 1988. The Michigan Code is based on the *Model Code of Professional Responsibility* (Model Code) developed by the American Bar Association (ABA) and approved by the ABA House of Delegates in 1970. The Michigan Code is divided into nine sections, each headed by different one-sentence maxims of legal ethics called "Canons." Each section contains one or more mandatory rules of professional conduct, called "Disciplinary Rules," numbered sequentially beginning with

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2. MICH. CONST. art. VI, § 5.

3. *See In re* Grimes, 414 Mich. 483, 326 N.W.2d 380 *reh'g denied*, 417 Mich. 1101, 327 N.W.2d 314 (1982); *In re* Mills, 1 Mich. 392 (1850); *see also* Dubin & Schwartz, *supra* note 1, at 1, 4.

4. An "integrated" bar association is a jurisdiction-wide bar organization that requires bar membership in order to practice in that jurisdiction. Unlike voluntary bar associations, such as the American Bar Association and the Detroit Bar Association, integrated bar associations are generally created by the authority of a court or a legislature. Because integrated bar associations receive their authority from these official origins, these bar associations are frequently clothed with state power in relation to the licensing and regulation of attorneys.

5. The State Bar had the power and responsibility of disciplining Michigan lawyers from 1935—1970. For an account of the reasons why the supreme court removed this power and transferred it to its own agencies, see Dubin & Schwartz, *supra* note 1, at 2-3.

6. The Code may be located in various publications. *See, e.g.*, MICHIGAN RULES OF COURT 1987 1355-83 (1987) (reprinting MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY (1987)). The text of the newly adopted *Michigan Rules of Professional Responsibility* will appear in the June 1988 issue of the Michigan Bar Journal along with a summary of the major substantive changes from the MODEL CODE.

"101" for each section with a numerical prefix identifying the Canon under which the rule falls. For example, the first Disciplinary Rule in the first Canon is cited as DR 1-101.

Most states joined Michigan in adopting the ABA Model Code in the early 1970s. There are, however, several important differences between the Michigan Code and the ABA Model Code. The ABA Model Code contains in each section, in addition to Canons and Disciplinary Rules, a number of one-paragraph expositions on legal ethics called "Ethical Considerations." The purpose of the Ethical Considerations is to supplement the mandatory Disciplinary Rules with aspirational objectives that are not a basis for discipline but rather serve to guide conduct. The Michigan Supreme Court, without explanation, declined to adopt the Ethical Considerations.[7]

A second point of divergence between the Michigan Code and the Model Code developed in 1974 when the ABA amended DR 7-102(B)(1) to exempt an attorney from the duty of disclosing a client's fraudulent conduct, including perjury, if disclosure would violate the duty of confidentiality set out in DR 4-101.[8] The Michigan Supreme Court declined to adopt this amendment; thus under the Michigan Code attorneys are required to breach client confidentiality if necessary to rectify client fraud perpetrated in the course of representation.

The third major difference[9] between the Michigan Code and the Model Code was created by Administrative Order 1978-4, which the Michigan Supreme Court issued in 1978. The order suspended DR 2-101 and DR 2-102, regulating attorney advertising, and replaced these rules with a blanket approval of "the use of any form of public communication that is not false, fraudulent, misleading, or deceptive."[10] The order is currently in effect.[11]

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7. A number of commentators have criticized the Ethical Considerations as confusing rather than clarifying the Model Code. Dissatisfaction with the tripartite structure of the Model Code (Canons, Ethical Considerations, and Disciplinary Rules) was one of the reasons the ABA reviewed and ultimately discarded the Model Code within 13 years of its creation.

8. For an explanation of this amendment, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (on file at *The Wayne Law Review*). *Compare* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) *with* Nix v. Whiteside, 457 U.S. 157 (1986).

9. Other differences can be found in DR 2-106(C) and DR 5-105(D).

10. Admin. Order No. 1978-4, 402 Mich. lxxxvi (1978). The impetus for Administrative Order 1987-4 was the decision in Bates v. State Bar, 433 U.S. 350 (1977), in which the court held that the first amendment protects attorney

The Michigan Code is not accompanied by any comments or advisory committee notes. Thus, the only legislative history derives from the development of the ABA Model Code, which served as the basis for the Michigan Code.[12] The Michigan Code receives authoritative interpretation in the disciplinary process. The Michigan Supreme Court has delegated attorney discipline to two agencies: the Attorney Grievance Commission (Grievance Commission) and the Attorney Discipline Board (Board).[13] The Grievance Commission, through its Administrator and staff, investigates and prosecutes complaints of attorney misconduct. Should the Grievance Commission elect to proceed with a formal complaint of misconduct, the Board will appoint a hearing panel consisting of three attorneys to adjudicate the discipline case. Each hearing panel is empowered to make findings of fact and law and to impose discipline. The complainant, the respondent attorney, and the Grievance Commission all have the right to petition the Board to review a panel's decision. The decision of the Board is final unless the supreme court grants leave to appeal, which is a rare occurrence.

Because the supreme court rarely considers an attorney discipline case, the decisions of the Board would appear to constitute the major source for interpreting the Michigan Code. Unfortunately, to date, the Board's opinions are neither available in an official reporter nor indexed in a standard annotation or a treatise on Michigan law.[14] The Board published all its opinions rendered

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advertising and, therefore, DR 2-101 and DR-102 may not be imposed to punish attorneys who advertise their legal fees. Administrative Order 1978-4, however, left in place both DR 2-103 and DR 2-104, which prohibit solicitation. *See* MBA Comm. on Judicial and Professional Ethics, Formal Op. C-236 (1985), *reprinted in Ethics Opinion—Formal Opinion C-236*, 65 MICH. B.J. 97 (1986) (DR 2-103 and DR 2-104 should continue to be enforced with regard to personal solicitation but should not be construed to prevent truthful and non-deceptive advertising).

11. *See* Admin. Order No. 1979-3, 405 Mich. lviii (1979); Admin. Order No. 1979-7, 407 Mich. lxxii (1979).

12. The most important sources for interpreting the ABA Model Code are the ABA Formal Ethics Opinions, including those ethics opinions that interpreted the 1908 ABA *Canons of Ethics*, which preceded the Model Code, and those that have interpreted the Model Code itself.

13. MICH. CT. R. 9.101-.131. A complete, albeit slightly dated, account of the Michigan disciplinary procedure, including descriptions of the operations of both the Grievance Commission and the Board, is found in Dubin & Schwartz, *supra* note 1, at 3-29.

14. The *Michigan Bar Journal* publishes each order of discipline, whether imposed by a hearing panel or the Board. However, these orders usually describe

since its creation in 1978 through December 1985 in a bound volume.[15] This publication is currently out of print although law schools and most bar libraries may have copies. Board opinions issued since January of 1986 are available only in slip form from the Board itself and are not indexed.[16] Even if Board opinions were accessible, their utility as an interpretive guide to the Michigan Code would be limited because, rather than focusing on the substantive principles of legal ethics, the Board tends to be preoccupied with petitions to increase or decrease discipline imposed by the hearing panels.

Due to the lack of reported decisions interpreting the Michigan Code, the State Bar of Michigan continues to serve an important role despite its lack of official authority to enforce the Code. The State Bar maintains an active Committee on Professional and Judicial Ethics composed of at least three members of the judiciary. The Committee issues written opinions on request concerning the propriety of contemplated professional conduct. The Committee will not respond to requests regarding conduct that has already taken place or to inquiries by one attorney regarding the conduct of another.[17] Most of the Committee's opinions are "informal opinions" addressed primarily to the requesting party. If the Committee believes an opinion addresses a situation that is of general interest to the public or the profession, the Committee will forward the opinion to the State Bar's governing body, the Board of Commissioners.[18] If approved by the Board of Commissioners, such opinions become "formal opinions" and are published in the *Michigan Bar Journal.* Because formal State Bar opinions are published in a form accessible to all Michigan attorneys and address difficult and important substantive issues of legal ethics, they form

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the finding of misconduct in a cursory manner and are useless as precedent. Efforts are currently underway to secure publication of the Board's opinions in an official reporter.

15. The index to this volume is organized idiosyncratically and is difficult to use. The volume does not include an indexed digest of opinions.

16. Board opinions surveyed in this Article are on file at *The Wayne Law Review.*

17. MBA Comm. on Professional and Judicial Ethics, Rule 2 Duties of Committees. This self-imposed restraint, which prevents the State Bar from encroaching into the area of attorney discipline, is consistent with MICH. CT. R. 9.107(B) (local bar association may not conduct separate proceeding to discipline attorney).

18. MBA Comm. on Professional and Judicial Ethics, Rule 4 Consideration of Requests.

a body of interpretative authority apparently more influential than the decisions of the Attorney Discipline Board.[19] For this reason, this *Survey* will include both unpublished Board opinions and published formal State Bar opinions.

A final source of interpretive guidance for the Michigan Code is found in court decisions that refer to the Michigan Code in non-disciplinary contexts. The most important collateral use of the Michigan Code is found in lawyer malpractice cases.[20] Under Michigan law, a violation of the Michigan Code is rebuttable evidence of malpractice.[21] Accordingly, malpractice cases are included in this *Survey* because these cases often result in persuasive judicial interpretation of the duties imposed by the Michigan Code. This Article also reviews malpractice decisions because the potential of malpractice liability may in practice regulate attorney conduct at least as powerfully as the risk of formal attorney discipline proceedings.

II. LEGAL ETHICS

The most important development in Michigan's substantive law of legal ethics took place outside the *Survey* period when the Michigan Supreme Court decided to replace the Michigan Code with the MRPC, as discussed above.[22] During the *Survey* period, the court amended one section of the Michigan Code regarding client funds.[23] Also during this period the State Bar interpreted a provision prohibiting aiding in the unauthorized practice of law.[24] In addition, the Board issued two opinions that focused on conflicts of interest.

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19. It is entirely proper for the State Bar to express its own opinions as to the meaning of the Michigan Code even though these opinions are binding on no one. While the Board would not likely discipline attorneys who rely in good faith on a State Bar ethics opinion, the Board would clearly be free to reject the State Bar's interpretation of any Disciplinary Rule.

20. Other collateral uses of the Michigan Code include decisions involving claims of ineffective assistance of counsel in criminal cases and motions to disqualify opposing counsel.

21. Lipton v. Boesky, 110 Mich. App. 589, 597-98, 313 N.W.2d 163, 166-67 (1981). However, the Preliminary Statement to the Model Code explicitly states that the Model Code does not define standards for civil malpractice liability. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement (1982)

22. *See supra* note 6 and accompanying text.

23. MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1987).

24. *Id.* DR 3-101.

A. Unauthorized Practice of Law

Canon Three of the Michigan Code states that "a lawyer should assist in preventing the unauthorized practice of law."[25] This Canon is implemented by DR 3-101(A): "A lawyer shall not aid a non-lawyer in the unauthorized practice of law."[26] As is often the case, the language of the implementing rule is much narrower than that of the underlying Canon. Disciplinary Rule 3-101(A) literally only prohibits certain action, such as aiding a non-lawyer engaged in unauthorized practice, while Canon Three urges an affirmative duty to take action, such as assisting in the prevention of unauthorized practice. In Formal Opinion C-239,[27] issued on September 3, 1986, the State Bar effectively read into DR 3-101(A) the affirmative duty imposed by Canon Three: "We believe that DR 3-101(A) . . . requires more of a lawyer than simply avoiding active assistance to unauthorized practice. It is our opinion that an attorney has an ethical obligation to employ appropriate means to prevent unauthorized practice of law by non-lawyers."[28]

Opinion C-239 was based on rather unusual facts. A member of the State Bar serving as an administrative law judge (ALJ) reported to the State Bar Committee on Unauthorized Practice the fact that a state agency which was a party to the proceedings before the ALJ was represented by a non-lawyer agency employee. It is not clear whether the ALJ also separately requested an ethics opinion or whether the ethical issue was referred to the Ethics Committee by the Committee on Unauthorized Practice.

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25. *Id.* Canon 3. The statutory prohibition on the unauthorized practice of law applies to persons who are not licensed to practice law in Michigan. MICH. COMP. LAWS ANN. § 600.916 (West 1981). The Michigan Code thus enlists attorneys in the enforcement of the statute. Michigan law is conspicuously vague in the definition of what constitutes the "practice of law." *See* State Bar v. Cramer, 399 Mich. 116, 133, 249 N.W.2d 1, 6 (1976) (per curiam) ("No essential definition of the practice of law has been articulated and the descriptive definitions which have been agreed upon from time to time have only permitted disposition of specific questions.").

26. MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101 (A) (1987). The second part of this rule, *id.* DR 3-101(B), prohibits lawyers from practicing contrary to the regulations of the jurisdiction. The other two rules in Canon Three prohibit a lawyer from either dividing legal fees with a non-lawyer, *id.* DR 3-102, or forming a law partnership with a non-lawyer. *Id.* DR 3-103.

27. MBA Comm on Judicial and Professional Ethics, Formal Op. C-239 (1986), *reprinted in Ethics Opinion— Formal Opinion C-239*, 65 MICH. B.J. 1198 (1986) [hereinafter *Formal Opinion C-239*].

28. *Id.*

Three questions were addressed to the Ethics Committee: (1) whether the appearance of a non-lawyer employee of a state agency in a representative capacity constituted unauthorized practice; (2) whether a lawyer has an ethical duty to prevent unauthorized practice; and (3) if there is an ethical duty to prevent unauthorized practice, what actions must a lawyer take. The Ethics Committee declined to answer the first question on the grounds that it was beyond its jurisdiction.[29] After noting that there was little authority for interpreting DR 3-101(A) beyond "simply refraining from assisting unauthorized practice,"[30] the Ethics Committee concluded that the rule imposed an affirmative duty to prevent unauthorized practice. The Ethics Committee opined that the lawyer-ALJ sufficiently discharged that duty by reporting the conduct of the non-lawyer to the Committee on Unauthorized Conduct, but *only* because it was not clear that the conduct constituted unauthorized practice of law. Had the conduct fallen "within accepted judicial and/or legislative definitions of unauthorized practice" the ALJ should not have allowed the non-lawyer to represent the state agency in the administrative proceedings.[31]

There are three troubling aspects to Formal Opinion C-239. First, the opinion effectively substitutes the language of Canon Three for that of DR 3-103(A), thus subverting the functional distinction between Canons and Disciplinary Rules in the Michigan Code. As explained in the Preamble to the Model Code, the

> Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct ex-

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29. *Id.* The State Bar enforces the statutory prohibition on unauthorized practice by initiating a contempt action in the appropriate circuit court. MICH. COMP. LAWS ANN. § 600.916 (West 1981). The State Bar delegated this power to its Committee on Unauthorized Practice of Law, not the Ethics Committee. Further, the Ethics Committee routinely declines to interpret statutes or other sources of law other than the Code itself. In the particular facts giving rise to this opinion, the Committee on Unauthorized Practice of Law declined to prosecute the non-lawyer state employee. *Formal Opinion C-239*, *supra* note 27, at 1198.

30. *Formal Opinion C-239*, *supra* note 27, at 1198. The only authorities cited in Formal Op. C-239 on this point were two *informal* ethics opinions, MBA Comm. on Judicial and Professional Ethics, Informal Op. CI-404 (1979) and *id.*, Informal Op. CI-551 (1980), which "assumed, without discussion, an obligation to do what is in one's power to prevent unauthorized practice." Formal Opinion C-239, *supra* note 27, at 1198. Both of these informal opinions also concluded that a lawyer serving as an ALJ was prohibited by DR 3-101(A) from allowing a non-lawyer to practice law before the ALJ.

31. *Formal Opinion C-239*, *supra* note 27, at 1198-99.

> pected of lawyers . . . [and] embody the general concepts from which . . . the Disciplinary Rules are derived . . . [the] Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.[32]

The Canons urge a standard of behavior much more demanding, albeit more vague, than the disciplinary rules that follow them.[33] They are hortatory, not mandatory: the Canons always use the verb "should" while the disciplinary rules consistently use "shall."

The differing language of Canon Three and DR 3-103(A) clearly reflects this functional difference. Although lawyers are exhorted by Canon Three to assist in preventing unauthorized practice, DR 3-103(A) would discipline only lawyers who actually aid a non-lawyer in the unauthorized practice of law. Formal Opinion C-239 erases the distinction by interpreting DR 3-103(A), contrary to its carefully drafted language, as if it read like Canon Three. This interpretation subjects lawyers to potential discipline if they are aware of unauthorized practice of law and do not attempt to prevent it, even if they play no role in supporting such practice by a non-lawyer.[34]

The second troubling aspect of Formal Opinion C-239 is an apparent insensitivity to the necessary autonomy of administrative law judges and other adjudicatory officials who are lawyers only incidentally. An ALJ should decide whether a state agency can be represented by a non-lawyer based only on the controlling administrative law, free of any implied threat to personal discipline as a lawyer for conduct taken entirely in a judicial capacity. A restrained interpretation of DR 3-103(A), in which the ALJ would not be aiding the non-lawyer by merely permitting him to represent the State in proceedings before the ALJ, would have avoided this potential problem. This interpretation would relieve the ALJ from the threat of personal discipline despite the fact that the ALJ might have failed to comply with Canon Three which requires him to exercise judicial power to prevent such representation.

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32. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement (1982).

33. *See, e.g., id.* Canon 8 ("A Lawyer Should Assist in Improving the Legal System"); *id.* Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

34. Of course, as explained *supra* note 5 and accompanying text, the State Bar has no role in attorney discipline and its ethics opinions are not binding on either the Attorney Grievance Commission or the Attorney Discipline Board.

The third and final unsettling implication is the self- serving appearance of this ethics opinion. A variety of commentators have criticized the preoccupation of bar organizations with preventing unauthorized practice of law as motivated by monopoly interests rather than a desire to protect the public.[35] Lawyers in Michigan do not enjoy an exclusive monopoly on representation in administrative proceedings. Persons who contest the conduct of state agencies or are compelled to appear before state agencies are frequently authorized by statute or regulation to use non-lawyers to represent them.[36] Since non-lawyers may represent individuals in this context, it is unclear why state agencies cannot be permitted a similar option. Surely state agencies are capable of protecting their own interests without the assistance of the State Bar.[37] In the leading case of *State Bar v. Cramer*,[38] the Michigan Supreme Court said that the statutory prohibition on unauthorized practice of law must be construed with the purpose of protecting the public.[39] Yet, the ABA's most recent discussion of professional responsibility and attorney discipline described DR 3-101 as exemplifying a duty to the legal profession, *not* to the public.[40] Formal Opinion C-239 is evidence that self-protection of the profession's monopoly rather than public protection remains the driving force behind the interpretation and enforcement of DR 3-101.

B. Conflict of Interest

Disciplinary Rule 5-101(A) sets out a general rule prohibiting lawyers from accepting employment if their own financial or

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35. *See, e.g.*, M.S. FRIEDMAN, CAPITALISM AND FREEDOM 144-49 (1962); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Address by Clark Durant, Chairman of the Legal Services Corporation, ABA Mid-Winter Meeting, "Maximizing Access to Justice: A Challenge to the Legal Profession" (Feb. 12, 1987).

36. An extensive list of federal and Michigan administrative agencies that allow lay representation can be found in Justice Levin's dissent in *Cramer*, 399 Mich. at 158-59 n.24, 249 N.W.2d at 18-19 n.24.

37. The Michigan Attorney General forwarded his views on this case to the Ethics Committee, taking the position that an agency may decide under its own rules who may practice before it. Although admitting that the issue was beyond its jurisdiction, the Committee nonetheless felt obliged to address the Attorney General's position in a footnote, asserting that his position "is open to very serious question." *Formal Opinion C-239*, *supra* note 27, at 1199, n.2.

38. 399 Mich. 116, 249 N.W.2d 1 (1976) (per curiam).

39. *Id.* at 134, 249 N.W.2d at 7.

40. AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS, 5-6 (1986).

personal interests might affect their representation of the client. A more specific statement of this general principle is found in DR 5-104(A), which prohibits business transactions with a client if the lawyer and the client have differing interests and the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction. The client may waive both prohibitions after full disclosure by the lawyer of the potential conflict of interest. Two decisions of the Attorney Discipline Board during the *Survey* period represent the continuing trend toward limiting the client consent exception that permits representation when the attorney has a personal financial stake.

In *Schwartz v. Williams*[41] the respondent attorney borrowed $17,000 from his client out of settlement proceeds and gave a mortgage on his own home as security. The lawyer failed to make payment when due, forcing the client to hire another attorney in order to foreclose. The respondent successfully defended the foreclosure on the ground that the mortgage interest rate was usurious.[42] The Board found a violation of DR 5-104(A) because the client had relied on the attorney's professional judgment in negotiating the mortgage. The attorney's failure to disclose that the negotiated interest rate was usurious and could be forfeited if the mortgage was litigated vitiated the client's consent.[43] The Board used the *Williams* case as an opportunity to warn attorneys borrowing money from clients to be prepared to establish a high degree of good faith.[44] This warning is consistent with the higher standards that will be imposed on attorneys under Michigan Rule of Professional Conduct 1.8(a),[45] which prohibits business trans-

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41. Schwartz v. Williams, No. DP 197/85 (Mich. Att. Discipline Bd. filed May 20, 1987) (on file at *The Wayne Law Review*).

42. In the foreclosure action, the court reformed the mortgage interest rate from 14% to 7%. Although the mortgage note called for full payment within six months, the reformed balance was not paid until the last day of the redemption period, three and a half years later. The client was forced to expend $4,000 in attorney fees to collect on the mortgage.

43. The Board found additional violations of the Michigan Code resulting from the fact that the respondent damaged his client during the course of the professional relationship, MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(3) (1980), knowingly failed to disclose that which by law he was required to reveal, *id.* DR 7-102(A)(3), and engaged in conduct involving dishonesty, *id.* DR 1-102(A)(4).

44. *Williams*, No. DP 197/85, at 1.

45. MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) provides:
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary

actions with a client *even with disclosure and client consent* unless the transaction is fair and the client is given the opportunity to seek independent legal advice.[46] Unfortunately the stern language of the Board in *Williams* was undermined by the lenient sanction imposed—a suspension of less than four months.[47]

In *Schwartz v. Doherty*,[48] the Board took the unusual step of dismissing the Grievance Administrator's complaint against the respondent while at the same time using the case to warn the profession against engaging in the charged conduct. The respondent attorney had drafted several wills and a revocable living trust for a client naming the respondent and his wife as the sole beneficiaries in these instruments. Because the respondent's representation of his client might reasonably have been affected by his financial interest as beneficiary, DR 5-101(A) would have been violated absent client consent following full disclosure of the potential conflict of interest. The Board's decision in *Doherty* inexplicably made no reference to DR 5-101(A) and, in addition, the Board made no specific finding that the disclosure and consent requirements had been met. Instead, the Board merely reaffirmed its prior decision, *In re Watson*,[49] in which it established a *per se* rule

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interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

46. The Board pointed out that the respondent might have avoided these disciplinary proceedings had he simply referred his client to another attorney for advice on negotiating the mortgage. *Williams*, No DP 197/85, at 2.

47. The *Williams* matter came before the Board on the Grievance Administrator's appeal seeking increased discipline. The Board affirmed the panel order suspending the respondent for 119 days, thus allowing the respondent automatic reinstatement at the end of the suspension period. Had the panel suspended the respondent for 120 days or more, under the then-applicable rules, the respondent would have been required to petition for reinstatement and establish fitness to practice law. The Board noted that the discipline imposed by the panel "could have been more severe" but deferred to the panel's decision to give mitigating weight to the respondent's claimed alcoholism, subsequent rehabilitation, and efforts to discharge his financial obligations. *Id.*

48. Schwartz v. Doherty, No. DP 153/84 (Mich. Att. Discipline Bd. filed Sept. 30, 1986) (on file at *The Wayne Law Review*).

49. No. DP 209/82 (Mich. Att. Discipline Bd.) (July 18, 1983), *leave to app. denied*, 418 Mich. 1201 (1984).

that a lawyer who drafts a will naming himself as a beneficiary is guilty of misconduct absent exceptional circumstances. The *Watson* rule was neither based on DR 5-101(A) nor any other conflict of interest rule, but rather on the Code's general prohibitions of conduct prejudicial to the administration of justice or adversely reflecting on fitness to practice law.[50]

The Board, however, affirmed the panel decision dismissing the complaint against the respondent on the ground that the *Watson* rule, announced in 1983, should not apply retroactively in this case because the respondent drafted the instruments in 1979 and 1980. The panel's decision had been based on the respondent's rebuttal of a presumption of undue influence.[51]

Despite the dismissal of the Grievance Administrator's complaint, the thrust of *Doherty* condemned the respondent's conduct and reemphasized the "specific warning" to the profession issued in *Watson*. Unfortunately, the unpublished character of the Board's decisions and limited distribution make these "warnings" ineffective as a practical matter. The issue will be resolved by Michigan Rule of Professional Conduct 1.8(c), which categorically prohibits a lawyer from preparing an instrument—including a will—that gives the lawyer or specified close relatives of the lawyer any substantial gift unless the client is related to the donee.[52]

C. *Client Funds*

On March 16, 1987 the Michigan Supreme Court amended the section of the Michigan Code, DR 9-102, which governs the handling of client funds and property.[53] The purpose of this amendment was to require attorneys to deposit all client funds, other than advances for costs and expenses, into interest-bearing

50. *See* MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (A)(5)-(6), 7-101(A)(3) (1987). *Watson* also cited *In re* Powers Estate, 375 Mich. 150, 134 N.W.2d 148 (1965); Abrey v. Duffield, 149 Mich. 248, 259, 112 N.W. 936, 939-40 (1907); *In re* Estate of Karabatian, 17 Mich. App. 541, 170 N.W.2d 166 (1959).

51. The Board decision is silent as to the evidence which supported the panel's conclusion that there was no undue influence.

52. MRPC 1.8(c) is properly placed under the heading "Conflict of Interest: Prohibited Transactions," showing the derivation of the prohibition from the general principle enunciated in DR 5-101(A).

53. Administrative Order No. 1987-3, 428 Mich. cxxxvi (1987); For background information on the Michigan IOLTA program, *see* Michigan State Bar Foundation, Michigan IOLTA, The First Year 1987 (Jan. 1988) [hereinafter cited as Michigan IOLTA] (on file at *The Wayne Law Review*).

accounts and to divert interest earned on nominal funds to subsidize law-related charitable activities, primarily civil legal services to the poor. The amendment made Michigan the forty-fourth state to adopt what is known as an Interest on Lawyer Trust Account (IOLTA) program.

IOLTA programs are designed to replace the reduction in federal funding of low-income legal services programs under the Reagan administration. IOLTA is attractive because it promises to generate significant funds for legal aid—possibly more than $1 million per year in Michigan alone—at no cost to lawyers, their clients, or the public. This feat is accomplished by pooling small and short-term client trust fund deposits into a single interest bearing account with interest paid directly to the Michigan Bar Foundation. Without pooling the trust funds would not yield net interest to individual clients because the bank charges would exceed the very nominal interest earned by any given small or short-term deposit. Principles of fiduciary responsibility prevent attorneys from using interest earned even on pooled client funds.[54] The IOLTA concept turns this dilemma to constructive use by diverting the interest on such pooled trust funds to charitable purposes, primarily legal services to the poor.[55]

The court amended DR 9-102(A) to require that *all* client funds, other than advances for costs and expenses, be deposited in interest-bearing accounts unless the client directs otherwise.[56] Disciplinary Rule 9-102(C) now requires that client funds "which at the time of receipt and deposit the lawyer . . . reasonably anticipates will generate $50 or less in interest during the period for which it is anticipated such funds are to be held" are to be deposited in a pooled interest-bearing trust account with interest paid to the Michigan State Bar Foundation.[57] A lawyer may not

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54. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

55. Constitutional challenges to the IOLTA programs have failed because clients lack any property interest in the interest earned on small and short-term deposits since such interest is smaller than the administrative costs of identifying and paying it to the client. *See* Cone v. State Bar, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987); Carroll v. State Bar, 166 Cal. 3d 1193, 213 Cal. Rptr. 305, *cert. denied sub nom.* Chapman v. State Bar, 474 U.S. 848 (1985).

56. Prior to amendment, DR 9-102(A) required that client funds be deposited in identifiable bank accounts but did not specify that the accounts be interest-bearing.

57. MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(C) (1987).

be disciplined for a good faith, albeit mistaken, decision as to whether client funds will generate $50 or less in interest.[58] Client funds need not be deposited in an IOLTA account if: (1) the client directs that the funds not be placed in an interest-bearing account; (2) a separate interest-bearing account is established for the specific client with interest paid to the client; or (3) the funds are deposited in a pooled interest-bearing account with subaccounting that provides for payment to the client of interest attributable to the client's funds.[59]

Concurrent with the amendment of DR 9-102, the court issued Administrative Order 1987-3, which assigned administration of the Lawyer Trust Account Program to the Michigan State Bar Foundation. In addition to various administrative directions, the Order provides that the Foundation shall disburse not less than 80% of the IOLTA interest received to support the delivery of civil legal services to the poor and not more than 20% to support the general purposes of the Foundation.[60]

The effective date of Administrative Order 1987-3 has been repeatedly delayed: from July 1, 1987 to October 1, 1987,[61] then from October 1, 1987 to January 1, 1988,[62] and most recently from January 1, 1988 until further order of the court.[63] The primary reason for these delays has been the time necessary to obtain certain legal rulings. IOLTA works when federal banking agencies have granted exceptions to the general prohibition against interest-bearing (NOW) accounts for most commercial purposes, such as law firms. While those exceptions have now been granted for Michigan's IOLTA program, one major ruling remains to be obtained before IOLTA can become operational. The program is currently on hold pending an IRS ruling on the potential federal tax implications of the client opt-out provision in DR 9-102(C)(2), which is unique to Michigan's IOLTA program. Although considerable variation exists among states as to whether *attorney* partic-

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58. *Id.* DR 9-102(C)(1)(b).

59. *Id.* DR 9-102(C)(2).

60. The general purposes of the Foundation include improving the administration of justice, advancing the science of jurisprudence, and preserving the American constitutional form of government.

61. *In re Amendment to DR 9-102* (order entered May 8, 1987), *reprinted in* Michigan IOLTA, *supra* note 53, Appendix 4.

62. *In re Amendment to DR 9-102* (order entered September 1, 1987), *reprinted in* Michigan IOLTA, *supra* note 53, Appendix 4.

63. *In Re Amendment to DR 9-102* (order entered October 23, 1987), *reprinted in* Michigan IOLTA. *supra* note 53 Appendix 4.

ipation in IOLTA is voluntary or mandatory, only Michigan gives the client the choice of directing that the funds, including small or short-term funds, not be deposited in an IOLTA account. This element of client control may cause the Internal Revenue Service (IRS) to treat IOLTA interest as client income on the theory that the client's failure to exercise the opt-out choice makes the interest paid to the Bar Foundation a voluntary donation by the client.[64] Should the IRS treat IOLTA interest as client income, Michigan's IOLTA program may be doomed to failure because the cost of tracking and reporting the nominal interest earned on behalf of each client will exceed the interest itself, thus destroying the economic premise for the IOLTA approach.

With information from tax counsel, the Bar Foundation petitioned the court to delete the client opt-out provision in 9-102(C)(2). The court denied the petition in the fall of 1987 without explanation. This denial may best be understood in light of the history surrounding the adoption of the IOLTA program in Michigan. In January of 1983 the Representative Assembly of the State Bar adopted a proposal from the State Bar Legal Aid Committee to establish a mandatory IOLTA program. In July of 1983 the State Bar petitioned the court to adopt amendments to DR 9-102 creating the program. In October of 1983 the court ordered the proposal published for comment, but subsequently declined to adopt the proposal without written explanation. In April of 1986 the State Bar again petitioned the court to adopt an IOLTA program and on December 11, 1986 the court entered Administrative Order 1986-2,[65] amending DR 9-102 in essentially the same way as Administrative Order 1987-3, which superseded it. Adoption was on a five to two vote, with Justices Levin and Griffin dissenting.[66] The client opt-out provision, which had not appeared in the State Bar proposal, may have been a necessary compromise to obtain

64. In an IRS letter ruling which established that the interest paid over to the bar foundation participating in the particular IOLTA program under review was not includible in the gross income of either the client or the law firm and thus need not be reported by the bank or law firm on Form 1099, it was apparently material that "[n]o client may individually elect whether to participate in the program." IRS Letter Ruling 8730033, (April 27, 1987).

65. Admin. Order No. 1986-2, *superseded by* Admin. Order No. 1987-3, 428 Mich. at cxxxiv (1987).

66. Chief Justice Riley had dissented from Administrative Order 1986-2, *id.* She concurred in Administrative Order No. 1987-3, making clear her continued opposition to the IOLTA concept, saying: "What is not ours we cannot give away, no matter how laudable the purpose." 428 Mich. at cxxxiv (1987).

the bare majority needed to adopt an IOLTA program.[67] If so, the court's refusal to drop the opt-out provision despite the potentially adverse tax implications that threaten the success of the IOLTA program is more comprehensible. The court may also simply want to force the State Bar Foundation to return to the IRS for relief, in the hope that the IRS will clarify or alter its current position. In the meantime, unless the IRS renders a favorable ruling, the effective date of the IOLTA program, and the amendments to DR 9-102, will continue to be delayed.

III. Attorney Discipline

The major changes to the Michigan law of attorney discipline during the *Survey* period were accomplished through a number of amendments to *Michigan Court Rules* (MCR) Chapter 9, which became effective June 1, 1987. In addition, the Board issued a trilogy of decisions mandating minimum sanctions to be imposed on a defaulting respondent.

A. Grounds for Discipline

The Michigan Supreme Court amended MCR 9.104[68] to make an adjudication of misconduct in another state or a federal court conclusive proof of misconduct for purposes of Michigan discipline. *Michigan Court Rule* 9.104 prevents an attorney disciplined in another jurisdiction from collaterally attacking the prior finding of misconduct in a Michigan disciplinary proceeding. As a result, the only issues to be decided in the Michigan proceeding are whether the attorney received due process in the earlier proceeding and whether imposition of the identical discipline in Michigan is inappropriate. Prior to the amendment, MCR 9.104 merely pro-

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67. Since the majority issued no opinion explaining the basis for the decision, the reasons for the court's shift in position is unclear. The court changed its composition and one new member, Justice Archer, was an advocate for the IOLTA proposal while president of the State Bar. It may also be that the court was moved by the very earnest brief personally prepared by State Bar President George Roumell. The brief opens with the admirable directness and sincerity for which Mr. Roumell is well known: "If the poor of our state do not have access to justice, then we are depriving that segment of our population of its freedom. This is the reason why this President opted to write this Brief, rather than to show up another Bar function, for this is critical to our entire system of justice." Brief by George Roumell to the Michigan Supreme Court (April 7, 1986) (on file at *The Wayne Law Review).*

68. Mich. Ct. R. 9.104.

vided that an adjudication of misconduct in another jurisdiction "is evidence of misconduct" in a Michigan proceeding.

An amendment to MCR 9.120[69] similarly limited collateral attacks on a criminal conviction used as a basis for discipline. The amendment did not alter the section of the rule which stated that the judgment of conviction is conclusive proof that the crime was committed; the amendment, however, added a specific prohibition against raising "questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies" in a disciplinary proceeding.[70]

B. Procedure

The amendments added two pre-hearing procedures. First, the limited right to discover documentary evidence and the identity of witnesses previously afforded to respondents was extended to the Attorney Grievance Administrator.[71] Second, a hearing panel is required to order, on its own motion, an independent medical examination of any respondent who alleges that discipline should be mitigated due to the attorney's physical or mental impairment.[72]

The amendments include an important change to the actual hearing procedure itself. Hearings are now bifurcated with the first hearing limited to the issue of misconduct.[73] Should the panel conclude that misconduct was involved, then a second hearing is held regarding the imposition of discipline.[74] The two hearings can take place consecutively on the same day, but the hearing panel cannot address the issue of discipline until after misconduct has been established. The effect of this bifurcation is to prevent evidence relevant only to discipline, such as prior misconduct or mitigating circumstances, from tainting the adjudication of misconduct.

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69. *Id.* 9.120.

70. *Id.* 9.120(A)(3).

71. *Id.* 9.115(F)(4)(a)-(b).

72. *Id.* 9.121(C)(2). MICH. CT. R. 9.121 provides that discipline may be mitigated to probation for an impaired attorney. The amendment was no doubt motivated by concerns that the impairment defense has been abused and that some hearing panels too readily accept the defense without adequate proof. *See* Dubin & Schwartz, *supra* note 1, at 28. Under the amended rule, should the respondent fail to appear for an ordered examination, the sanction is ineligibility for probation.

73. MICH. CT. R. 9.115(J)(1).

74. *Id.* 9.115(J)(2).

A final procedural change affects the Board proceedings. *Michigan Court Rule* 9.110(B)[75] provides that two out of the seven members of the Board must be laypersons. A former provision in MCR 9.118(C)(1), which required that at least one lay member be present whenever the Board held a hearing, has been deleted. The Board currently has a quorum if three members are present, even if all three are attorneys.[76] This change is particularly significant in light of the supreme court's rejection of another amendment, proposed by the Grievance Commission, which would have required that each hearing panel, currently consisting exclusively of attorneys, include one lay member.[77] The Grievance Commission argued that the same policy which required non-lawyer participation in attorney discipline at the Board level should also mandate such participation on hearing panels. The court responded by rejecting an expanded role for non-lawyers and retreating from the existing commitment to lay participation in Board hearings. It is troubling that the court made this significant policy decision without explanation or explicit recognition. The staff comment to amended MCR 9.118 discusses four changes to that rule without acknowledging the elimination of the lay participation requirement.

The explanation for the change may be found in a letter sent by the State Bar to the court opposing the Grievance Commission's proposal for lay participation in hearing panels. Arguing that lay participation in hearing panels would be administratively unworkable, the State Bar noted that the Board has not been able to

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75. *Id.* 9.110(B).

76. *Id.* 9.118(C)(1).

77. The Grievance Commission proposal would have amended MICH. CT. R. 9.111(A) to read in part:

> The board must annually appoint 2 attorneys and 1 non-attorney to each hearing panel and must fill a vacancy as it occurs. A vacancy occasioned by the absence of an attorney must be filled by another attorney; a vacancy occasioned by the absence of a non-attorney must be filled by another non-attorney. The chairman, who shall make all rulings of evidence, must be a lawyer.

Even even had the court adopted this proposal, however, hearing panels would have been able to convene and act without a lay member present since any two members would constitute a quorum. Contrast this quorum requirement with the former rule governing Board hearings that required the presence of a lay member for a quorum. The Grievance Commission proposal was published by the supreme court for comment on September 22, 1986 together with the amendments ultimately adopted. *See Proposed Amendments to MCR 9.101, 9.104, 9.106, 9.111 - 9.116, and 9.118 - 9.128; and Proposed New MCR 9.132*, 65 MICH. B.J. 1028-34 (1986).

arrange to have both lay members present at any of its sessions.[78] In light of this sad admission, the amendment to MCR 9.118(C)(1) appears to be a concession by default to the lack of commitment by the lay Board members. Allowing the Board to function without their participation, however, seems an inadequate response to the problem. It is difficult to believe that there are no qualified non-lawyers willing to attend all Board proceedings. The Board should report to the court those current lay members that lack the requisite interest, commitment, or available time, and replacements should be identified. On the other hand, should the amendment to MCR 9.118(C)(1) reflect a policy decision that lay participation in attorney discipline is no longer an important value, the court would be more candid to delete the requirement that two of the seven Board members be non-lawyers rather than exclude non-lawyers from the quorum definition.

C. *Sanctions*

In addition to the changes regarding sanctions implemented by the amendments to Chapter 9 of the *Michigan Court Rules*, the Board decided three cases in which it established an important policy mandating minimum sanctions for defaulting respondents. In both *Schwartz v. Moray*[79] and *Schwartz v.Evans*[80] the respondent failed to comply with the Request for Investigation, to answer the formal complaint, and to appear at the hearing.[81] The hearing panel in *Moray* merely reprimanded the absent respondent[82] and

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78. Letter from Michael Franck, Executive Director, State Bar of Michigan, to Al Lynch, Chief Commissioner, Michigan Supreme Court 4 (February 26, 1986) (on file at *The Wayne Law Review*). The Board wrote separately in opposition to the Grievance Commission's proposal but did not mention difficulty in securing lay member attendance. Letter from John F. VanBolt, Executive Director, Attorney Discipline Board, to Al Lynch, Chief Commissioner, Michigan Supreme Court 2-3 (February 27, 1987) (on file at *The Wayne Law Review*).

79. No. DP 143/86 (Mich. Att. Discipline Bd. filed Mar. 4, 1987) (on file at *The Wayne Law Review*).

80. Nos. DP 23/86, DP 60/86 (Mich. Att. Discipline Bd. filed Mar. 4, 1987) (on file at *The Wayne Law Review*).

81. Failure to answer a request for investigation or a formal complaint is misconduct and grounds for discipline. MICH. CT. R. 9.104(7).

82. The panel chairperson explained the decision by stating: "We . . . share the concern that Mr. Moray has apparently dropped off the face of the earth and not communicated with the State Bar Grievance Administrator [sic] and that is a legitimate concern. On the other hand, there are any number of plausible explanations for that, which do not subject [him to] misconduct . . . ." *Moray*, No. DP 143/86 at 2.

the panel in *Evans* only imposed a 60-day suspension. After a general statement of the importance of requiring attorneys to respond to discipline proceedings, the Board in both decisions increased the sanction to a 120 day suspension and announced a policy of minimum sanction: "As a general rule, respondents who fail to answer the Request for Investigation, fail to answer the Formal Complaint and fail to appear at the hearing should be suspended for a minimum period of 120 days . . . ."[83]

At the time of the *Evans* and *Moray* decisions, a suspension of an attorney for more than 119 days remained in effect until a hearing panel granted a petition for reinstatement. In order to prevail in a petition for reinstatement the respondent attorney must establish by clear and convincing evidence his compliance with the discipline imposed and his current fitness to practice law. Thus, a defaulting respondent remained indefinitely suspended until he came forward and petitioned for reinstatement; at the reinstatement hearing the respondent had to explain his failure to respond. Now, under the amended rules, the minimum period required to trigger the petition for reinstatement procedure is increased from a 120 day suspension to a 180 day suspension.[84] However, given the rationale behind both the *Moray* and *Evans* Board's imposition of a minimum suspension of 120 days, it seems likely that the Board would now require a minimum suspension of 180 days.

In *Schwartz v.Glenn*,[85] the respondent also failed to answer the Request for Investigation and the formal complaint, but he did appear at the hearing. The hearing panel merely imposed a reprimand, which the Board increased to a thirty day suspension. As in *Evans* and *Moray*, the Board took the opportunity to announce a minimum sanctions policy:

> Our decision . . . is intended to serve notice upon . . . the Bar that the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and Formal Complaints does so at his or her peril and that, absent

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83. *Evans*, No. DP at 3; *Moray*, No. DP 143/86 at 5.

84. MICH. CT. R. 9.106(A)(2). Proposed amendments to MICH. CT. R. 9.123 and *id.* 9.124, governing reinstatement eligibility and procedures, remain under consideration by the court. As a result, these two rules still refer to the shorter minimum suspension period creating a technical inconsistency within Chapter 9 of the *Michigan Court Rules*.

85. No. DP 91/86 (Mich. Att. Discipline Bd. filed Feb. 23, 1987) (on file at *The Wayne Law Review*).

exceptional circumstances, that attorney may expect discipline greater than a Reprimand.[86]

The amended rules now provide that if suspension is imposed, the minimum period of suspension must be 30 days.[87] Thus, discipline greater than a reprimand by definition would be a minimum suspension of 30 days.

The recent amendments added another minimum sanction rule. Michigan Court Rule 9.128 already provided that when discipline is imposed the respondent must reimburse the State Bar for costs allocable to the hearing and that payment of costs must be a condition of reinstatement.[88] As amended, MCR 9.128 requires an automatic suspension if costs are not paid within the prescribed period. This suspension remains in effect until either costs are paid or a hearing panel or the Board approves a payment plan.[89] In addition, other amendments allowing hearing panels to add conditions to a reprimand such as a requirement of continuing legal education, reformed office operations, or personal counselling[90] and allowing interim suspension pending final decision on a formal complaint, provide further flexibility in imposing sanctions.[91]

The final significant change in the rules regarding sanctions is an expanded revision of MCR 9.119 governing the conduct of suspended attorneys. The amended rule sets forth with particularity the kind of notice suspended attorneys must provide both their clients and all tribunals in which the attorney was representing a client in litigation. Restrictions on the practice of law and on the sharing of legal fees are also specified in detail.[92]

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86. *Id.* at 5-6. The sanction in *Glenn* was based solely on the failure to respond to the request for investigation and the complaint. The hearing panel dismissed the underlying complaint of misconduct despite the default entered against the respondent. The Board reversed the dismissal, holding that the panel was bound to take the Grievance Administrator's allegations as true because of the default. (Although the respondent appeared at the hearing, he did not move to set aside the default.) However, the Board only reprimanded the respondent on the underlying complaint. Board member Patrick J. Keating dissented to the extent of supporting the panel's decision to require the Grievance Administrator to submit proofs on the defaulted complaint and then make an independent decision on the merits of the complaint.

87. MICH. CT. R. 9.106(A)(2).

88. *Id.* 9.128.

89. *Id.* 9.120.

90. *Id.* 9.106(A)(3).

91. *Id.* 9.127(A).

92. *Id.* 9.119.

The court did not adopt the most controversial proposed amendment regarding minimum sanctions. The Attorney Grievance Commission had advocated the adoption of a habitual offender rule that would require a minimum suspension of 180 days for a second finding of misconduct, three years for a third finding of misconduct, and disbarment for a four-time offender. In vigorous opposition to the proposal, both the State Bar and the Attorney Discipline Board argued that unfettered discretion in setting discipline should remain vested in the Board subject only to review on leave by the Michigan Supreme Court.

Regardless of the merits of the Grievance Commission's unsuccessful proposal, which indeed may have been too inflexible and heavy-handed, the problem of unrestricted discretion in imposing discipline deserves continuing attention. Apart from the Board's recent decisions on minimum sanctions for defaulting respondents, hearing panels imposing discipline have little guidance.

In 1986, the ABA approved a fifty-four page document entitled, *Standards for Imposing Lawyer Sanctions*.[93] These standards categorize all potential disciplinary rule violations based on the nature of the duty violated, the extent of actual or potential injury, and the degree of intentionality. Each categorization corresponds to a recommended level of sanction, ranging from disbarment to admonition, adjustable if aggravating or mitigating circumstances are present. The standards are not intended to be mandatory; their purpose is to induce attorney discipline committees to consider and weigh all relevant factors before imposing discipline and to increase consistency in the treatment of the same or similar offenses.[94]

In 1987, the Board's Executive Director distributed copies of this ABA publication to hearing panel members but did not give specific guidance to the use of the standards.[95] Adoption of the

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93. AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986).

94. *Id.* § 1.3.

95. In his transmittal letter to hearing panel members, the Board's Executive Director indicated that neither the Michigan Supreme Court nor the Attorney Discipline Board have adopted the ABA standards, and stated: "As with any recognized reference or authority . . . a hearing panel report may make reference to a particular standard if it would be helpful in explaining a panel's decision." Memorandum from John F. Van Bolt, Executive Director, Michigan Attorney Discipline Board, to Hearing Panel Members (undated) (on file at *The Wayne Law Review*).

ABA standards by the Board, either by a directive or through a decision, would represent a major advance in guiding the currently unrestricted discretion of hearing panels in imposing sanctions. Despite the possibility that hearing panels would often impose sanctions different than those recommended by the ABA standards, requiring panels to explain these differences based on the factors outlined in the standards would result in better reasoned and more principled hearing decisions. As a result, fewer decisions might be appealed to the Board, which is now largely preoccupied with adjusting the level of sanctions imposed by hearing panels.

D. *Immunity*

Prior to the 1987 amendments, MCR 9.125 provided persons with immunity from suit for statements "made without malice and intended for transmittal" to the Attorney Grievance Commission or given in a discipline proceeding.[96] The provision requiring absence of malice was deleted and the rule now states that a person "is absolutely immune" from suit for such statements.[97] The amended rule also added the word "absolutely" in describing the immunity afforded to hearing panel members, the Grievance Commission, the Board, and the staff of both bodies for conduct arising out of the performance of their duties.[98]

IV. ATTORNEY MALPRACTICE

There were two reported malpractice cases during the *Survey* period. They primarily addressed two issues specific to malpractice law: limitations period and causation.

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96. MICH. CT. R. 9.125.

97. *Id.* The rule now specifies that the statements must have been transmitted solely to the Grievance Commission instead of referring to "statements . . . intended for transmittal" to the Grievance Commission.

98. The absolute immunity created by MICH. CT. R. 9.125, of course, does not provide a defense to an action based on federal law. Martinez v. California, 444 U.S. 277, 284 n.8 (1980). Federal law extends absolute immunity from suit for damages to judges, Stump v. Sparkman, 435 U.S. 349 (1978); administrative law judges, Butz v. Economou, 438 U.S. 478 (1978); and prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976). The Grievance Commission and Board would reasonably seem to be entitled to similar immunity. *See* Lepley v. Dresser, No. K86-199CA4, slip. op. (W.D. Mich. Jan. 8, 1988) (Gibson, J.) (staff members of the Michigan Attorney Grievance enjoy absolute immunity from liability in a federal civil rights action because they perform quasi-judicial functions delegated by the Michigan Supreme Court).

A. *Limitations Period*

Under Michigan law the plaintiff must bring an action for legal malpractice within two years of the date the attorney ceased to serve the plaintiff or within six months after the plaintiff discovered or should have discovered the existence of the claim, whichever is later.[99] In *Dowker v. Peacock*[100] the court of appeals interpreted both prongs of this test. For the first prong, the court held that the date on which the attorney ceased to serve the client is the date a client discharges the attorney rather than the later date when another attorney is formally substituted.[101] In order to apply the second prong the court was required to determine when a claim for legal malpractice accrues and can thus be discovered by a plaintiff. Because a malpractice claim accrues only when all the necessary elements, including damages, have occurred, the court held "that the period of limitation . . . begins to run from the time the result of the attorney's inaction or delay is irremediable."[102] The alleged malpractice in *Dowker* resulted from the attorney's delay in prosecuting plaintiff's case to trial. Applying its interpretation of the second prong, the court found that the claim did not accrue until the defendant in the underlying action filed bankruptcy before trial could be scheduled, even though plaintiff had discharged his attorney over two years before the defendant filed for bankruptcy.[103] The damage caused by the alleged delay did not become identifiable until the defendant became bankrupt and, thus, a malpractice action filed within six months of the date of the bankruptcy filing was timely.

B. *Causation*

One of the most daunting barriers to plaintiffs in a legal malpractice case is the "case within a case" doctrine of causation followed in many jurisdictions. This doctrine requires a plaintiff

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99. MICH. COMP. LAWS ANN. §§ 600.5805(4), .5838 (West 1987).

100. 152 Mich. App. 669, 394 N.W.2d 65 (1986) (per curiam).

101. *Id.* at 672, 394 N.W.2d at 66 (citing Berry v. Zisman, 70 Mich. App. 376, 379, 245 N.W.2d 758, 759 (1976); Basic Food Indus. v. Travis, Warren, Nayer & Burgoyne, 60 Mich. App. 492, 496, 231 N.W.2d 466, 469 (1975)). In *Dowker*, the client unequivocally and in writing discharged the attorney and the attorney acknowledged this in writing. *But see* Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981) (attorney responsible for representing client until motion to withdraw granted if attorney initiated termination of representation).

102. 152 Mich. App. at 673, 394 N.W.2d 66.

103. *Id.* at 674, 394 N.W.2d at 67.

who claims a case was lost in litigation due to attorney malpractice to prove that but for the malpractice the plaintiff would have prevailed in the underlying action. In *Ignotov v. Reiter*,[104] the Michigan Supreme Court split three to three over the application of this doctrine, thus affirming by equal division the court of appeals decision against the plaintiff.[105]

The underlying "case within a case" in *Ignotov* was an action by a divorced woman to terminate her ex-husband's parental rights, in part for failure to pay child support. The woman offered to settle in exchange for payment of back support and increased future support. The ex-husband told his attorney that he was unwilling to pay child support, and counsel in turn advised him that termination of parental rights was likely absent payment. Apparently frustrated with his client's intransigence, the ex-husband's attorney failed to either notify his client of the court hearing or to appear on his behalf. At the hearing, the ex-husband lost his parental rights.

Writing on behalf of himself and Chief Justice Williams, Justice Levin advanced a novel argument for the allegedly aggrieved client. Conceding that the plaintiff failed to prove that he would have prevailed at the hearing if properly represented, Justice Levin suggested that the claimed loss was not the parental rights *per se* but rather a lost settlement opportunity which had determinable value. According to Justice Levin, had counsel continued professionally competent representation he might have succeeded in shifting his client's position before the hearing and negotiated a settlement that would have preserved parental rights in exchange for payment of an amount of support acceptable to his client.[106]

Justice Boyle also would have found for the plaintiff but not on the grounds advanced by Justice Levin. She limited the loss of settlement approach to cases, unlike *Ignotov*, in which the attorney failed to disclose a settlement proposal to the client or failed to offer an authorized settlement proposal to the other party.[107] She would have required the plaintiff to prove that his attorney's

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104. 425 Mich. 391, 390 N.W.2d 614 (1986).

105. Chief Justice Williams and Justices Levin and Boyle would have reversed; Justices Riley, Brickley, and Cavanagh voted to affirm; Justice Archer took no part in the decision.

106. 425 Mich. at 397, 390 N.W.2d at 616. Justice Levin's opinion contains the following sage advice: "Even stubborn clients are entitled to continued representation." *Id.* at 398, 390 N.W.2d at 616.

107. *Id.* at 401, 390 N.W.2d at 618.

malpractice caused the loss of his parental rights, but would have reversed the court of appeals for demanding that the plaintiff show that the malpractice was "the" proximate cause rather than merely "a" proximate cause.[108]

Justice Riley, writing for herself and Justices Brickley and Cavanagh, would have affirmed the court of appeals decision as a proper application of the "case within a case" approach, although agreeing with Justice Boyle that the plaintiff need only prove that the malpractice was "a" proximate cause.[109] She criticized Justice Levin's approach as an attempt to circumvent the "case within a case" doctrine.[110]

Because the court was unable to muster a majority in the *Ignotov* case, the proper application of the "case within a case" doctrine is unclear. The *Ignotov* decision reflects the difficulty of applying the doctrine in a way that is fair to the defending attorney without creating impossible proof problems for the plaintiff.

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108. *Id.* at 400-01, 390 N.W.2d at 617-18.
109. *Id.* at 402 n.1, 390 N.W.2d at 618 n.1.
110. *Id.* at 404 n.3, 390 N.W.2d at 619 n.3.